

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Application of)	
)	
OREGON STATE UNIVERSITY)	File No. BMPLIF-961223FN
)	
For Authority to Modify Instructional Television)	
Fixed Service Station WNC718 at Salem, Oregon)	

ORDER ON RECONSIDERATION

Adopted: November 12, 2003

Released: November 14, 2003

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us a request by Oregon State University (Oregon State) for reconsideration¹ of the December 18, 1997 decision of the former Video Services Division, Mass Media Bureau (Division) denying Oregon State's December 23, 1996 request to modify its license to operate Instructional Television Fixed Service (ITFS)² Station WNC718 on the C Group channels in Salem, Oregon. Specifically, the Division found that Oregon State failed to provide co-channel interference protection to ITFS Station WHR522 operated by the Portland Regional Educational Telecommunications Corporation (PRETC) in Portland, Oregon.³ We also have before us a request for a waiver⁴ of Section 74.903 of the Commission's Rules.⁵ For the reasons set forth below, we deny Oregon State's Petition and Waiver Request.

II. BACKGROUND

2. Both Oregon State and PRETC lease excess capacity on Stations WNC718 and WHR522 to American Telecasting Inc. (ATI),⁶ a wireless cable operator, and the Basic Trading Area auction winner of the Salem, Oregon and Portland, Oregon markets.⁷ According to Oregon State, based on negotiations with ATI, Oregon State and PRETC sought to apply for major changes to their respective

¹ Petition for Reconsideration (filed Mar. 5, 98) (Petition).

² A fixed station operated by an educational organization and used primarily for the transmission of visual and aural instructional, cultural, and other types of educational material to one or more fixed receiving locations.

³ Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau to Margaret Miller, Esq., counsel for Oregon State University at 2. (dated Dec. 18, 1997) (Division letter).

⁴ Petition, Exhibit 7, Request for Waiver (filed Mar. 5, 1998) (Waiver Request).

⁵ 47 C.F.R. § 74.903.

⁶ Petition at 3.

⁷ Waiver Request at 1.

Stations in 1995.⁸ Specifically, they were to relocate to collocated wireless cable sites in their respective markets and upgrade their respective stations to fifty watts transmitter power output.⁹ On May 25, 1995, PRETC filed an application for a major change for Station WHR522.¹⁰ On October 19, 1995, PRETC filed a consent letter stating that PRETC had no objection to Oregon State's major application to modify its license for Station WNC718.¹¹ PRETC stated that its consent was contingent on Oregon State's agreement to cease transmitting on Station WNC718 if PRETC notified Oregon State that Station WNC718 was causing harmful interference to Station WHR522.¹² On October 20, 1995, Oregon State filed an application for a major change to "relocate the tower site for Station WNC718 to the site of the Salem wireless cable system being developed by ATI."¹³ On August 2, 1996, PRETC's major change application for Station WHR522 was granted.¹⁴ On August 29, 1996, PRETC filed an application for digital operations for WHR522 and requested a waiver of the interference protection standards contained in Section 74.903 of the Commission's Rules concerning interference between Stations WHR522 and WNC718.¹⁵ According to Oregon State, PRETC acknowledged that interference existed between these two stations since they were initially authorized and asserted that a waiver was warranted because the grant of the application will neither increase nor cause interference to co-channel or adjacent channel stations.¹⁶

3. On December 23, 1996, Oregon State filed the captioned application to amend its pending October 20, 1995 application.¹⁷ In this December 23, 1996 amendment, Oregon State sought to modify the license for Station WCN718 by relocating the transmitting site 14.5 kilometers (9 miles) from its authorized location, increasing the Effective Isotropic Radiated Power (EIRP) by 9.1 dBW,¹⁸ increasing the transmitting antenna radiation center, and changing the transmitter emission type. Although Oregon State indicated that it would submit a consent letter from PRETC agreeing to these changes to the proposed facilities in the October 20, 1995 major change application, such a letter was never filed.¹⁹ Instead, PRETC filed a petition to deny alleging that Oregon State's proposed modification would result in co-channel interference to PRETC's protected service area.²⁰

4. On December 18, 1997, the Division dismissed the December 23, 1996 major change application because Oregon State failed to engineer Station WNC718 to provide co-channel interference protection to ITFS Station WHR522 licensed to PRETC.²¹ Specifically, the Division stated that "[o]ur engineering review of Oregon State's application reveals that its modified facility is predicted to cause

⁸ Petition at 3.

⁹ *Id.*

¹⁰ FCC File No. BMPIF-19950525EL; Petition, Exhibit 3 at 1.

¹¹ Petition at 4 and Exhibit 2.

¹² *Id.* at Exhibit 2.

¹³ FCC File No. BMPLIF-951020N1; Petition at 4.

¹⁴ FCC File No. BMPLIF-950525EL; Petition, Exhibit 3 at 1.

¹⁵ FCC File No. BMPLIF-960829DE; Petition, Exhibit 3 at 2.

¹⁶ Petition, Exhibit 3 at 2.

¹⁷ *Id.* at 4.

¹⁸ See Oregon State's applications, File Nos. BPIF-19931230EN and BMPLIF-19961223FN.

¹⁹ Petition at 5.

²⁰ *Id.*

²¹ Division letter at 2.

harmful interference to portions of PRETC's protected service area."²² The Division also indicated that contrary to Oregon State's assertion, PRETC did request a protected service area.²³ Furthermore, the Division found that although the protected service area benefits the wireless cable operator, the wireless cable operator cannot waive PRETC's expanded protected service area without PRETC's consent.²⁴ Public notice of the dismissal was given on February 3, 1998.²⁵ On March 5, 1998, Oregon State filed the instant Petition. On April 1, 1998, PRETC filed an Opposition to Petition for Reconsideration (Opposition).²⁶ After filing several Consent Motions for Extension of Time, Oregon State replied to the Opposition on November 14, 2001.²⁷

III. DISCUSSION

A. Petition for Reconsideration

5. Oregon State argues that the Division made several mistakes when it dismissed Oregon State's December 23, 1996 major change application. We disagree.

6. *PRETC's consent letter.* Oregon State argues that the Division failed to consider the consent letter submitted by PRETC for Oregon State's October 20, 1995 major change application.²⁸ Oregon State contends that its December 23, 1996 proposal is virtually identical to the October 20, 1995 application, but at a "slightly different transmit point,"²⁹ which is 400 feet from the site proposed in 1995.³⁰ According to Oregon State this change would only slightly increase the level of harmful interference³¹ to Station WHR522 compared to the October 20, 1995 application³² that PRETC had consented to, and, therefore, the Division should treat PRETC's earlier consent agreement³³ as the consent to its instant application.

7. On the other hand, PRETC argues that the Division correctly decided that PRETC's October 19, 1995 consent letter could not be used to imply PRETC's consent to the December 23, 1996 application.³⁴ Moreover, PRETC contends that even if its October 19, 1995 consent letter is applied to the December 23, 1996 amended major change application, Oregon State would still not be able to operate Station WNC718 because under the consent letter, Oregon State agreed to shut down its operations if harmful interference to Station WHR522 occurred.³⁵ PRETC contends that the appropriate course of action for Oregon State and ATI is to identify and propose engineering alternatives that protect

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ See MMB Broadcast Actions Public Notice Report No. 44170 (rel. Feb 3, 1998).

²⁶ Opposition to Petition for Reconsideration (filed Apr. 1, 1998) (Opposition).

²⁷ Reply to Opposition to Petition for Reconsideration (filed Nov. 14, 2001) (Reply to Opposition).

²⁸ Petition at *i*.

²⁹ *Id.*

³⁰ *Id.* at 7.

³¹ *Id.* at *i*.

³² See Oregon State's application, File No. BMPLIF-951020N1 filed on Oct. 20, 1995.

³³ Petition at Exhibit 2.

³⁴ Opposition at 2.

³⁵ *Id.*

PRETC's earlier authorized PSA from interference by Station WNC718.³⁶

8. Based on the record before us, we conclude that PRETC's consent to the October 20, 1995 application should not apply to the December 23, 1996 application. PRETC not only did not consent to the December 23, 1996 application, it filed a petition to deny that application. PRETC's actions in this regard have been unequivocal. Moreover, although Oregon State indicates that there are only minor differences between the October 20, 1995 application and the December 23, 1996 application, PRETC disagrees, and on the basis of that disagreement has refused to consent. Oregon State is asking us to compel PRETC's consent, which we believe is inappropriate under the circumstances presented.

9. *PRETC's PSA.* Oregon State also argues that the Division failed to consider whether Station WHR522 is qualified for 35-mile protected service area (PSA).³⁷ Oregon State argues that Station WHR522 is not entitled to claim a PSA because the 35-mile PSAs of Stations WNC718 and WHR522 overlap and have overlapped since each station was entitled to claim a PSA.³⁸ Oregon State claims that prior Commission orders had recognized this problem and provided a limited waiver exception for interference from such facilities.³⁹

10. PRETC argues that Station WNC718 does not possess a PSA because Oregon State's original application did not request one and because its December 23, 1996 major change application has been dismissed.⁴⁰ PRETC continues, however, that even if Station WNC718 had a PSA, Oregon State's argument is misguided because there are many instances where PSAs overlap.⁴¹ PRETC states that if the Commission were to establish a precedent for ignoring PSAs where overlap exists, it would eliminate PSA protection for most ITFS systems, except for those in geographically isolated locations.⁴² We decline to reconsider the decision granting a PSA for Station WHR522, which was made on August 2, 1996,⁴³ nearly seven years ago, and more than one year before Oregon State filed its Petition.⁴⁴

11. *Consent to interference.* Oregon State argues that the Division mistakenly held that a wireless cable operator cannot consent to interference for an ITFS station from which it leases excess air time.⁴⁵ Oregon State states that ATI designed and funded the facilities for Stations WHR522 and WNC718. According to Oregon State, ATI specifically engineered the two stations to accommodate mutually overlapping PSAs.⁴⁶ Oregon State argues that to hold that a wireless cable operator may not give consent to PSA interference would give one ITFS licensee in a coordinated, overlapping market "veto power" over neighboring ITFS licensees and would defeat the policy rationale behind protected service areas for ITFS licensees leasing excess capacity to support educational operations.⁴⁷ Oregon State maintains that because Station WHR522 received a PSA only because it leased excess capacity to ATI, a

³⁶ *Id.*

³⁷ Petition at i.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Opposition at 11.

⁴¹ *Id.*

⁴² *Id.*

⁴³ See FCC File No. BMPLIF-950525EL.

⁴⁴ See 47 C.F.R. 1.106(f).

⁴⁵ Petition at i.

⁴⁶ *Id.* at ii.

⁴⁷ *Id.*

wireless cable operator, ATI should be able to consent to interference to the PSA of Station WHR522.⁴⁸ Moreover, Oregon State argues that Station WHR522 is given PSA protection only during the hours of leasing to wireless cable operators, not during the hours of transmission of the ITFS licensee's programming.⁴⁹ Because PSAs were established for ITFS stations to facilitate the development of wireless cable systems, Oregon State argues that the Division should consider that such protection is extended to the ITFS licensee's authorized facilities.⁵⁰

12. PRETC maintains that under Section 74.903(e) of the Commission's Rules,⁵¹ ITFS entities, not wireless cable operators apply for PSA protection.⁵² We agree. Section 74.903(b)(4) of the Commission's Rules, states that in lieu of an interference analysis, the applicant may submit a statement from the "affected cochannel . . . licensee (s) that any resulting interference is acceptable."⁵³ Therefore, we will not consider a consent agreement executed by the wireless cable lessee to be sufficient, particularly when it is at odds with the stated intentions of the affected licensee.⁵⁴

13. *Administrative fairness.* Oregon State argues that basic administrative fairness requires that the Division similarly treat Oregon State and PRETC.⁵⁵ Oregon State maintains that PRETC and Oregon State are similarly situated parties because the ITFS facilities of both parties were funded by ATI, engineered by ATI, are entitled to a PSA based on excess capacity lease agreements with ATI negotiated during the same time frame, were planned for fifty-watt operation at collocated wireless cable sites selected by ATI, and seek to operate in markets that are separated by only 48.5 miles.⁵⁶ Oregon State argues that it cooperated with PRETC when PRETC upgraded Station WHR522, while PRETC denies Oregon State the right to achieve those same benefits for Station WNC718.⁵⁷ Oregon State maintains that PRETC's digital ITFS facilities were authorized despite the fact that those facilities would cause objectionable interference inside Station WNC718's PSA.⁵⁸ Oregon State argues that permitting PRETC to enforce its PSA rights would "hem in" Station WNC718 to its authorized ten-watt facilities, which would deprive Oregon State of the ability to realize the educational benefits of its upgraded facilities and the benefits of its bargain with ATI.⁵⁹ Oregon State argues that under the *Melody Music*⁶⁰ line of cases, the Division cannot grant PRETC's authorization and deny Oregon State's without adequate justification.⁶¹

⁴⁸ *Id.* at 2.

⁴⁹ *Id.* at 9.

⁵⁰ *Id.*

⁵¹ 47 C.F.R. § 74.903(e).

⁵² Opposition at 11.

⁵³ 47 C.F.R. § 74.903(b)(4).

⁵⁴ See Instructional Telecommunications Foundation, Inc., *Memorandum Opinion and Order*, 18 FCC Rcd 13114 (WTB PSPWD 2003); North American Catholic Educational Programming Foundation, Inc., 18 FCC Rcd 13088 (WTB PSPWD 2003).

⁵⁵ Petition at ii.

⁵⁶ *Id.* at 10.

⁵⁷ *Id.* at 2.

⁵⁸ *Id.*

⁵⁹ *Id.* at 6-7.

⁶⁰ *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir.1965).

⁶¹ Petition at 10.

14. PRETC argues that PSA protection, like all interference protection, “is based on seniority, with the newcomer having to accommodate previously authorized facilities.”⁶² Thus, PRETC argues, it is common for “otherwise similarly situated licensees to be accorded different interference protection.”⁶³ PRETC further maintains that the superficial similarities between PRETC and Oregon State have no relevance to the legal grounds on which the Division denies Oregon State’s application.⁶⁴ The Division treated Oregon State in accordance with and consistent with the applicable Commission rules, policies, and procedures. Because PRETC applied for and was granted an authorization before Oregon State, it has priority over Oregon State, which is consistent with the requirements of Section 74.903 of the Commission’s Rules. Based on the record before us, we believe that Oregon State has been afforded administrative fairness and do not find such argument persuasive.

15. *Public interest.* Finally, Oregon State argues that the public interest will be served by a grant of Oregon State’s application.⁶⁵ Oregon State argues that grant of its application is essential to instituting an educational programming service by the Oregon State Higher Education System.⁶⁶ Oregon State indicates that it has the support of the entire Oregon congressional delegation.⁶⁷ Oregon State indicates that Station WNC718 is part of a state-wide ITFS system to provide educational programming to sixty-five percent of the citizens from Oregon over all of the ITFS stations in Salem and Eugene.⁶⁸ We believe that Oregon State’s public interest argument alone is an insufficient basis on which to grant this petition in light of PRETC’s unambiguous objection to the level of interference that will be caused if Oregon State’s facilities were to be operated in accordance with its December 23, 1996 application. We do not believe that requiring non-consensual interference is in the public interest in this particular case. We therefore conclude that the Division’s dismissal of Oregon State’s December 23, 1996 application was correct.

B. Waiver Request

16. Oregon State attached to its reconsideration petition a request seeking a waiver of Section 74.903 of the Commission Rules.⁶⁹ In its waiver request, Oregon State explained that Station WHR522 is located on a tower that has line-of-sight into portions of Station WNC718’s PSA and Station WNC718 is located a tower that has line-of-sight into portions of Station WHR522’s PSA.⁷⁰ Nevertheless, according to Oregon State, PRETC may operate Station WHR522 because it requested a PSA for Station WHR522 before Oregon State requested a PSA for Station WNC718.⁷¹ Thus, according to Oregon State, when PRETC filed an application to upgrade its facilities it was required to protect only Station WNC718’s receive sites, which was accomplished by upgrading receive site antennas.⁷² When Oregon State applied on December 23, 1996 to upgrade Station WNC718, it was required to protect Station WHR522’s PSA,

⁶² Opposition at 15.

⁶³ *Id.*

⁶⁴ *Id.* at 3.

⁶⁵ Petition at ii.

⁶⁶ *Id.* at 11.

⁶⁷ *Id.* at ii.

⁶⁸ *Id.* at ii and 12.

⁶⁹ 47 C.F.R. § 74.903.

⁷⁰ Waiver Request at 2.

⁷¹ *Id.*

⁷² *Id.*

which Oregon State states is impossible to do.⁷³ Thus, Oregon State requests a waiver of Section 74.903 of the Commission's Rules and states that the Commission has indicated that it would allow limited exceptions to its interference criteria specifically when requested by stations in existence prior to the expansion of PSAs as it applies to interference caused by that expansion.⁷⁴ Oregon State explains that it did not request a waiver of Section 74.903 of the Commission's Rules when it filed its December 23, 1996 application because it thought that PRETC would consent as it had in 1995.⁷⁵

17. PRETC argues that Oregon State's waiver request is barred by Section 1.106 of the Commission's Rules because it should have been filed when the December 23, 1996 major change application was pending and because it relies on new facts.⁷⁶ PRETC argues that Oregon State's waiver request does not meet the requirements set forth in the Commission's orders, which require a demonstration that a modification application will not increase the size of the geographic area predicted to receive interference.⁷⁷ Moreover, PRETC states that Oregon State must demonstrate that interference would not increase compared to its current authorized facilities instead of showing that interference would not increase compared to its October 20, 1995 major change application.⁷⁸ PRETC maintains that the proper course for Oregon State to follow is to pursue a waiver of Section 74.903 of the Commission's Rules with a new major change application in the next ITFS filing window.⁷⁹ Moreover, PRETC argues that even if the waiver request were properly submitted, its core argument is erroneous.⁸⁰ Oregon State denies that its waiver request is based on new facts.⁸¹

18. When an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action.⁸² In this particular instance, Oregon State seeks a waiver under the Commission's *Declaratory Ruling and Order*⁸³ and the *Second Order on Reconsideration*⁸⁴ in which the Commission stated that to facilitate the introduction of digital technology it would allow a waiver of Section 74.903 of the Commission's Rules for ITFS incumbent licensees applying for digital authority. The Commission stated that under this limited exception, the "waiver submission must demonstrate that the facilities proposed in the modification application will not increase the geographic area predicted to receive interference, nor be predicted to cause harmful interference to any new portion

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 1.

⁷⁶ Opposition at 10.

⁷⁷ *Id.* at 3.

⁷⁸ *Id.*

⁷⁹ *Id.* at 10.

⁸⁰ *Id.*

⁸¹ Reply to Opposition at 2.

⁸² *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968) (*per curiam*)).

⁸³ Request for Declaratory Ruling on the Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Service Stations, *Declaratory Ruling and Order*, 11 FCC Rcd 18839 (1996) (*Declaratory Ruling and Order*).

⁸⁴ Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, & Cable Television Relay Service, *Second Order on Reconsideration*, Gen. Docket No. 90-54, 10 FCC Rcd 7074 (1995).

of the other station's protected area."⁸⁵ Based on the record before us, we conclude that Oregon State has failed to meet this burden. Oregon State admits that its proposed facilities would slightly increase the level of harmful interference to Station WHR522 as compared to its October 20, 1995 application.⁸⁶ Oregon State also admits that the December 23, 1996 amendment would slightly increase the size of the geographic area predicted to receive interference.⁸⁷ Moreover, we agree with PRETC that under the waiver standard, Oregon State must show that the facilities proposed in the December 23, 1996 application will not increase the geographic area predicted to receive interference, nor be predicted to cause harmful interference to any new portion of the Station's WHR522's authorized PSA. Oregon State has not done so. Consequently, we deny Oregon State's waiver request.

IV. CONCLUSION AND ORDERING CLAUSES

19. We therefore conclude that it is not in the public interest to grant Oregon State's petition for reconsideration because doing so would enable Station WNC718 to cause unacceptable interference to Station WHR522. For the reasons discussed above, we deny Oregon State's petition for reconsideration, and request for a wavier of Section 74.903 of the Commission's Rules.

20. ACORDINGLY, IT IS ORDERED, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405 and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, that the Petition for Reconsideration filed by Oregon State University on March 5, 1998 IS DENIED.

21. IT IS FURTHER ORDERED that pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405 and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, that the request for a waiver of Section 74.903 of the Commission's Rules, 47 C.F.R. § 74.903 filed by Oregon State University on March 5, 1998 IS DENIED.

22. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. § 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau

⁸⁵ *Declaratory Ruling and Order*, 11 FCC Rcd 18839, 18853 ¶ 23.

⁸⁶ Petition, at i.

⁸⁷ *Id.* at 7.